



What is school concurrency?

School concurrency is a system of land use regulations designed to meet the demands placed upon public school capacity by new residential development.¹ District school boards and local governments² achieve school concurrency when there are adequate school facilities available to accommodate increases in student enrollment resulting from new residential development.³

School concurrency involves both intergovernmental coordination and timing. District school boards and local governments must coordinate their respective educational facilities and comprehensive plans.⁴ Before approving proposed residential development, local governments and school boards must jointly determine whether adequate school capacity will be available to accommodate the development.⁵ A local government must deny an application for new residential development if adequate school capacity will not be available or under construction within three years of approving the application.⁶

¹ David L. Powell & Michelle Gazica, *And Now ... School Concurrency*, 79 Fla. B.J. 44, at 44 (2005); see also Florida Department of Education, *School Concurrency Frequently Asked Questions*, <http://www.fldoe.org/edfacil/faq.asp#schoolconcurrency> (last visited Sept. 10, 2010). Florida local governments, i.e., counties and municipalities, are also required to adopt concurrency management systems for sewer, solid waste, drainage, potable water, parks and recreation, schools, and transportation services. A local government may extend its concurrency management system to include additional types of public facilities and services. Section 163.3180(1)(a), F.S.

² For school concurrency purposes, the term "local government" refers to counties and municipalities. Section 163.3164(13), F.S.

³ Florida Department of Community Affairs, *Best Practices for School Concurrency*, at 8 (April 2007), available at <http://www.dca.state.fl.us/fdcp/DCP/SchoolPlanning/Files/schoolsbp.pdf> [hereinafter *Concurrency Best Practices*].

⁴ Section 163.3180(13)(a), F.S.; see Anne Trefz Gibson, *Implementing School Concurrency: The Challenges of Adopting a United Vision*, 80 Fla. B.J. 38, at 38-41 (2006). An educational facilities plan is a land use planning document that is adopted annually by the district school board. The plan includes long-range planning for facilities needs over 5-year, 10-year, and 20-year periods. The plan must be developed in coordination with local governments and be consistent with the local government comprehensive plans. Section 1013.35(1)-(2), F.S. Local governments must adopt comprehensive plans to plan for, and coordinate with other local governments, the use and development of land. Section 163.3177, F.S.; see *infra* text accompanying notes 19-26 (discussion of comprehensive plans).

⁵ Section 163.3180(13)(b) and (e), F.S.; *Concurrency Best Practices*, *supra* note 3, at 90-97 (discussion of school capacity determination and development application review processes).

⁶ Section 163.3180(13)(e), F.S. If adequate school capacity will not be available or under construction within three years of approval, the developer may provide "mitigation" to offset the impacts of the development on school capacity. If mitigation is provided, the development may proceed. *Id.*; see *infra* text accompanying notes 46-52 (discussion of proportionate share mitigation).

The Florida Legislature first required local governments to adopt school concurrency management systems in 2005.⁷ To comply with these requirements, each local government was required to amend its comprehensive plan and public school interlocal agreement⁸ to incorporate a school concurrency management system. Specifically, each local government was required to:⁹

- ❖ Update the intergovernmental coordination element of its comprehensive plan and interlocal agreement to include procedures for implementing school concurrency.¹⁰
- ❖ Adopt a public school facilities element into its comprehensive plan.¹¹
- ❖ Adopt level-of-service standards to establish maximum permissible school utilization rates relative to capacity and include these standards in an amended capital improvements element of the comprehensive plan and in the interlocal agreement.¹²
- ❖ Establish a financially feasible public school capital facilities program under which the adopted level-of-service standards will be met and include it in the comprehensive plan.¹³
- ❖ Establish a proportionate-share mitigation methodology and include it in the public school facilities element and interlocal agreement.¹⁴
- ❖ Establish public school concurrency service areas to define the geographic boundaries of school concurrency and include these areas in the interlocal agreement and in the supporting data and analysis for the comprehensive plan.¹⁵

Each of these requirements is discussed individually below. The deadline for adopting a public schools facilities element and interlocal agreement updates was December 1, 2008.¹⁶ As of October 2010, 61 school districts have executed the required interlocal agreements with local governments, and the Department of Community Affairs (DCA) has determined the agreements to be consistent with minimum requirements. Of those districts, 38 have implemented school concurrency on a district-wide basis, which means the county and all municipalities within the county have adopted compliant public school facilities elements.¹⁷ Palm Beach County School

⁷ See s. 5, ch. 2005-290, L.O.F. Prior to 2005, local government implementation of school concurrency was optional. Section 163.3180(13), F.S. (2004).

⁸ See *infra* text accompanying notes 27-33 (description of public school interlocal agreement).

⁹ Department of Community Affairs, *School Planning and Coordination*, <http://www.dca.state.fl.us/fdcp/dcp/SchoolPlanning/index.cfm> (last visited Sept. 13, 2010).

¹⁰ Sections 163.3177(6)(h), 163.3180(13)(g) and (h), and 163.31777(1)(d), F.S.

¹¹ Sections 163.3180(13)(a) and 163.3177(12), F.S.; see *infra* text accompanying notes 34-38 (discussion of public school facilities element).

¹² Section 163.3180(13)(b), F.S.; see *infra* text accompanying notes 39-42 (discussion of level-of-service standards).

¹³ Section 163.3180(13)(d), F.S.; s. 163.3177(3), F.S.; see *infra* text accompanying notes 43-45 (discussion of financial feasibility).

¹⁴ Section 163.3180(13)(e), F.S.; see *infra* text accompanying notes 46-52 (discussion of proportionate share mitigation).

¹⁵ Section 163.3180(13)(c) and (g), F.S.; see *infra* text accompanying notes 53-55 (discussion of concurrency service areas).

¹⁶ Section 163.3177(12)(i), F.S.

¹⁷ Email, Florida Department of Education, Legislative Affairs Director (Oct. 12, 2010). DCA has approved waivers for three districts (Franklin, Jefferson, and Monroe Counties) and two districts (Calhoun and Liberty Counties) have not submitted agreements for review. *Id.*

District implements school concurrency under an “optional” public school facilities element approved by the Department of Community Affairs in 2002.¹⁸

What is comprehensive planning?

Local governments must adopt comprehensive plans to guide future growth and development. Each plan must contain chapters or “elements” that address:

- ❖ Capital improvements;¹⁹
- ❖ Future land use planning;
- ❖ Traffic circulation;
- ❖ Sanitary sewer, solid waste, drainage, potable water, and natural groundwater aquifer recharge;
- ❖ Conservation and protection of natural resources;
- ❖ Recreation and open space;
- ❖ Housing;
- ❖ Coastal management;
- ❖ Coordination of local government comprehensive plans with the state plan and the plans of adjacent counties and municipalities;²⁰ and
- ❖ Public school facilities.²¹

Subject to certain exceptions, a local government may amend its adopted comprehensive plan up to twice per year.²² Every seven years, local governments must adopt an evaluation and appraisal report that evaluates the successes and weaknesses of the comprehensive plan and recommends changes.²³ Among other things, the report must assess the comprehensive plan’s effectiveness in projecting and meeting school capacity needs.²⁴ Each report must be reviewed by the DCA.²⁵ Subsequent to such review, a local government must amend its comprehensive plan based upon recommendations made in the report.²⁶

What is the public schools interlocal agreement?

The county and each municipality within a school district must enter into a public schools interlocal agreement to coordinate the district school board’s educational facilities plan with each

¹⁸ Email, Florida Department of Education, Legislative Affairs Director (Oct. 12, 2010). Legislation enacted in 1998 established subsection (12) of s. 163.3180, F.S. (1998), which authorized local governments to implement school concurrency on an optional basis. Section 5, ch. 98-176, L.O.F. This legislation first established standards for adopting a public school facilities element for incorporation into local comprehensive plans. Section 4, ch. 98-176, L.O.F.

¹⁹ Section 163.3177(3)(a), F.S.

²⁰ Section 163.3177(6)(a)–(h), F.S.

²¹ Section 163.3177(12), F.S.

²² Section 163.3187(1), F.S. Florida law specifies 17 exceptions to the limit on comprehensive plan amendments, including a specific exception for school concurrency related plan amendments. Sections 163.3177(12)(i) and 163.3187(1)(j), F.S.

²³ Section 163.3191(1)-(2), F.S.

²⁴ Section 163.3191(2)(k), F.S.

²⁵ Section 163.3191(6)-(9), F.S.

²⁶ Section 163.3191(10), F.S.

local government's comprehensive plan.²⁷ The agreement includes the methodology and procedures for determining level-of-service standards, concurrency service areas, and proportionate share mitigation options for public school facilities.²⁸ Each interlocal agreement must be submitted to DCA and the Department of Education's (DOE's) Office of Educational Facilities.²⁹ The agreement must include procedures for:

- ❖ Coordinating projections of population growth and forecasts of student enrollment;
- ❖ Coordinating and sharing information about existing and planned public school facilities;
- ❖ School facility site evaluation and new school site selection;
- ❖ Determining the need and timing of off-site improvements;
- ❖ Preparing school district facilities work program and plant surveys;
- ❖ Joint use of local government facilities for school purposes;
- ❖ Dispute resolution;
- ❖ Oversight; and
- ❖ Communicating regarding school capacity issues resulting from comprehensive plan amendments.³⁰

When planning the public schools interlocal agreement, district school boards and local governments must:

- ❖ Consider allowing students to attend the school located nearest their homes when a new housing development is constructed, including attendance at a school located in an adjacent county;
- ❖ Consider the effects of the location of public education facilities, including the feasibility of keeping central city facilities viable in order to encourage central city redevelopment; and
- ❖ Consult with state and local road departments to assist in implementing the Safe Routes to Schools Program administered by the Department of Transportation.³¹

The public schools interlocal agreement is necessary because local governments and school boards are constitutionally created entities with distinct spheres of authority over land use planning and school operations, respectively.³² The agreement facilitates collaborative school planning and decision making and enables these entities to coordinate their efforts in preparing, adopting, and amending the public school facilities element; annually updating the local government's capital improvements element and the school district's five-year educational facilities plan; and overall implementation of the school concurrency management system.³³

²⁷ Section 163.31777(1)(a), F.S.

²⁸ Section 163.3180(13)(g), F.S.; *Concurrency Best Practices*, *supra* note 3, at 23.

²⁹ Section 163.31777(1)(a), F.S.

³⁰ Section 163.31777(2), F.S.; *Concurrency Best Practices*, *supra* note 3, at 23-24.

³¹ Section 1013.33(1), F.S. The Safe Routes to Schools Program is a Federal Highway Administration grant program which aids the planning and construction of safe bicycle and pedestrian pathways for children to schools and parks. See Florida Department of Transportation, *Guidelines for Florida's Safe Routes to Schools Program: 2009-2010*, at 1 (Dec. 22, 2009), available at http://www.dot.state.fl.us/safety/SRTS_files/SRTS%20Guidelines.pdf. Statute refers to this program as the "Safe Paths to Schools Program." Section 1013.33(1), F.S.

³² Section 163.3180(13)(g), F.S.; see ss. 1 and 2, Art. VIII and s. 4, Art. IX of the State Constitution (county, municipality, and school board authority); see also *Concurrency Best Practices*, *supra* note 3, at 22.

³³ Sections 163.3177(3)(b)1., 163.31777(2)(a) and (f) and (12), and 163.3180(13)(g)1., F.S.; *Concurrency Best Practices*, *supra* note 3, at 22-25.

What is the public school facilities element?

Each county and municipality, in coordination with the district school board, must include a public school facilities element in its local comprehensive plan unless exempt or subject to a waiver.³⁴ This element is the primary school planning component of the local comprehensive plan. The purpose of the element is to implement a joint planning process between school boards and local governments for meeting educational facilities needs. It provides the analytical basis for projecting school capacity needs, establishing level-of-service standards and school concurrency service areas, defining school siting criteria, and locating future schools.³⁵

The public school facilities element facilitates county-wide compliance with the constitutional requirement for a uniform system of public education and must be consistent among all local governments within the county.³⁶ The element must be based upon professionally-accepted data and analysis from such sources as the public schools interlocal agreement, school district educational plant surveys and five-year school district educational facilities plans, population and housing projections used in local government comprehensive plans, and school enrollment projections developed through the consensus estimating process.³⁷ The statutory planning period requires a minimum of a five-year time-frame and a long-term planning period of at least 10 years.³⁸

What are level-of-service standards?

The level-of-service standard for a public school facility is the number of pupils to be served by the facility and is most often expressed as the percentage (ratio) of student enrollment to the student capacity of the school.³⁹ Public school level-of-service standards must be included in the public school facilities element and the capital improvements element of the local comprehensive plan and applied district-wide to all schools of the same type.⁴⁰ Types of schools may include elementary, middle, and high schools, as well as special purpose facilities such as magnet schools.⁴¹ District school boards and local governments may utilize tiered level-of-service

³⁴ Section 163.3177(12), F.S.; see *infra* text accompanying notes 57-60 (discussion of waiver of school concurrency requirements).

³⁵ Section 163.3177(12)(c), F.S.; *Concurrency Best Practices*, *supra* note 3, at 38-39.

³⁶ Section 163.3177(12), F.S. (introductory paragraph at beginning of subsection); see s. 1(a), Art. IX of the State Constitution; *Concurrency Best Practices*, *supra* note 3, at 38.

³⁷ Section 163.3177(12)(c), F.S.; *Concurrency Best Practices*, *supra* note 3, at 38-39.

³⁸ Section 163.3177(5)(a), F.S.

³⁹ *Concurrency Best Practices*, *supra* note 3, at 67-68; s. 163.3180(13)(b)1., F.S.; rule 9J-5.003(62), F.A.C. Rule defines “level-of-service” as the actual or proposed degree of service provided by a public facility based upon its operational characteristics. Level-of-service standards must indicate the capacity per unit of demand for each public facility and is a way of specifying when the demand on a facility or service has exceeded its capacity. Rule 9J-5.003(62), F.A.C.

⁴⁰ Sections 163.3177(12)(c) and 163.3180(13)(b)2., F.S. Uniform district-wide application of level-of-service standards is derived from the constitutional requirement that a uniform system of free public schools be provided in each county. See s. 1.(a), Art. IX of the State Constitution; see Florida Department of Community Affairs, *Final Report: Establishing Level of Service Standards for Public School Concurrency*, at 10 (May 2006), available at <http://www.dca.state.fl.us/fdcp/DCP/SchoolPlanning/Files/LevelofService.pdf> [hereinafter *Level-of-Service Standards*].

⁴¹ Section 163.3180(13)(b)2., F.S.

standards to address student backlogs in public school facilities. This is to allow time to achieve an adequate level-of-service as circumstances warrant.⁴²

What is “financial feasibility?”

Under school concurrency, each district school board and local government entity must establish a financially feasible public school capital facilities program under which the adopted level-of-service standards will be met and maintained.⁴³ “Financial feasibility” means that committed financing for capital improvements to school facilities must be currently available for the first three years, or will be available for years four and five, of a five-year capital improvement schedule. A comprehensive plan may satisfy the financial feasibility requirement for school facilities even if level-of-service standards are not met in a particular year, as long as the standards are met by the end of the planning period used in the capital improvement schedule.⁴⁴ A local government that has adopted a long-term transportation and school concurrency management system may use a period of 10 or 15 years.⁴⁵

What is “proportionate share mitigation?”

When school capacity is unavailable to support the impacts of a particular development proposal, such development is precluded from proceeding. “Proportionate-share-mitigation” enables a developer to execute a legally binding commitment to provide mitigation to offset the demand on public school facilities created by the development so that it may proceed. Options for proportionate-share mitigation are established locally in the public school facilities element and interlocal agreement.⁴⁶ Authorized mitigation options include:

- ❖ Contribution of land or payment for land acquisition for a public school facility;
- ❖ The construction, expansion, or payment for construction of a public school facility;
- ❖ The construction of a charter school that complies with the requirements for charter school facilities;⁴⁷ or

⁴² Section 163.3180(13)(b)3., F.S.

⁴³ Section 163.3180(13)(d), F.S.

⁴⁴ Section 163.3164(32), F.S. Financing for capital improvements may include such sources as ad valorem taxes, bonds, state and federal funds, tax revenues, impact fees, and developer contributions. *Id.*

⁴⁵ Section 163.3177(2), F.S.

⁴⁶ Section 163.3180(13)(e), F.S.; see also Florida Department of Community Affairs, *Proportionate Share Mitigation for School Concurrency*, at 4-6 (May 2006), available at <http://www.dca.state.fl.us/fdcp/DCP/SchoolPlanning/Files/ProportionateShareMitigation.pdf>.

⁴⁷ Start-up charter schools may choose to comply with State Requirements for Educational Facilities, but such compliance is optional. At a minimum, such schools must comply with the Florida Building Code and Florida Fire Prevention Code. Section 1002.33(18), F.S. Provisions authorizing the construction of a charter school as a proportionate share mitigation option were enacted into law by the passage of CS/CS/SB 360 in 2009. CS/CS/SB 360 (2009); s. 4, ch. 2009-96, L.O.F., codified at s. 163.3180(13)(e), F.S. On Aug. 26, 2010, the Circuit Court for the Second Judicial Circuit held that portions of CS/CS/SB 360 (2009) violate the State Constitution’s prohibition of unfunded local mandates. Rather than severing those provisions not held invalid, the court’s order invalidates the entire bill. *City of Weston v. Crist*, No. 2009 CS 2639 (Fla. 2nd Cir. Ct. Aug. 26, 2010); see Art. VII, s. 18(a) of the State Constitution. The state has appealed the trial court’s decision, which operates to stay the court’s ruling while the appeal is pending. Notice of Appeal, filed Sept. 24, 2010, *City of Weston v. Crist*, No. 2009 CS 2639 (Fla. 2nd Cir. Ct. Aug. 26, 2010)(appeal of denial of state’s request for rehearing); Fla. R. App. P. 9.310. The bill contained several

- ❖ Mitigation banking, which allows the developer to contribute mitigation that exceeds the actual impact of its development in exchange for proportionate share credits toward impact fees⁴⁸ or future development.⁴⁹

With the exception of mitigation banking, a developer who provides proportionate-share mitigation receives a dollar-for-dollar credit towards any impact fee or exaction imposed by the local government.⁵⁰ Any proportionate-share mitigation received by the district school board from a developer must be used to improve school capacity as identified in the district's five-year educational facilities work plan. Funds received as mitigation may not be used for operational expenses.⁵¹ While all approved public school facilities elements set local policies for acceptance of proportionate share mitigation, four Florida school districts report the use of proportionate share mitigation in their FY 2010-11 district facilities work plans. These districts are Hernando, Nassau, St. Johns and St. Lucie.⁵²

What are “concurrency service areas?”

Once level-of-service standards are set for each public school, the district school board and local government must establish concurrency service areas that the school will serve. The service area is the area within which the level-of-service will be measured when an application for a residential subdivision or site plan is reviewed. This allows the district and local government to assess whether proposed development will exceed the adopted level-of-service standards.⁵³

Concurrency service areas are included in the public schools interlocal agreement and the public school facilities element of the comprehensive plan.⁵⁴ Florida law encourages school boards and local governments to initially adopt district-wide concurrency service areas. Within five years after adopting school concurrency, school boards and local governments must utilize service areas that are less than district-wide, such as school attendance zones. Applying concurrency on

provisions impacting school concurrency which are discussed herein. CS/CS/SB 360 (2009); ss. 3 and 4, ch. 2009-96, L.O.F.; see *infra* text accompanying notes 58 and 61-63.

⁴⁸ Impact fees are used by local governments to control development and offset the impact of growth on local infrastructure and services. Unless superseded by constitutional or statutory provisions, local governments have broad authority to impose impact fees or exactions on development. Section 163.31801, F.S. (statutory authorization for impact fees); see ss. 1(f)-(g) and 2(b), Art. VIII of the State Constitution (home rule powers of counties and municipalities); s. 125.01(1) and (3), F.S. (county powers/duties); s. 166.021(1)-(4), F.S. (municipal powers/duties); *Hollywood, Inc. v. Broward County, Florida*, 431 So. 2d 606, 609-610 (Fla. 4th D.C.A. 1983)(Holding that Florida counties have implicit authority to impose impact fees or exactions on development so long as such fee or exaction is not inconsistent with general law and is rationally related to the need for additional infrastructure or services caused by the development).

⁴⁹ Section 163.3180(13)(e)1., F.S.

⁵⁰ Section 163.3180(13)(e)2., F.S.

⁵¹ Section 163.3180(13)(e)3., F.S.

⁵² Email, Florida Department of Education, Legislative Affairs Director (Oct. 12, 2010). This data is derived from FY 2010-11 facilities work plans submitted to DOE by Oct. 1. As of October 8, 2010, the DOE had not completed review of work plan data and therefore it may be subject to change. *Id.*

⁵³ Section 163.3180(13)(c), F.S.; *Level-of-Service Standards*, *supra* note 40, at 9-10.

⁵⁴ Section 163.3177(12)(g) and (h), F.S.; s. 163.3177(2), F.S.; s. 163.3180(13)(c) and (g)5., F.S.; *Concurrency Best Practices*, *supra* note 3, at 23.

a less than district-wide basis allows these entities to better coordinate development with the adopted levels-of-service.⁵⁵

Besides mitigation, when may a residential development commence despite inadequate classroom capacity?

If development is precluded because inadequate classroom capacity is available to mitigate its impacts on educational facilities, it may nevertheless commence if:

- ❖ The approved capital improvement element contains accelerated facilities that are scheduled for construction in year four or later of the plan and such facilities will mitigate the impact of the proposed development on school capacity when built; or
- ❖ Accelerated facilities are provided for in the next annual update of the capital facilities element, the developer and school district have entered into a binding, financially guaranteed agreement that the developer will construct the accelerated facility within the first three years of the plan, and the cost of the school facility is equal to or greater than the developer's proportionate share. The developer receives impact fee credits when the completed school facility is conveyed to the school district.⁵⁶

May local government entities receive a waiver or exemption from school concurrency requirements?

Yes. DCA may provide a county and the municipalities within that county with a waiver from school concurrency requirements if the capacity rate for all schools within the school district is no greater than 100 percent and the projected five-year capital outlay full-time equivalent student growth rate is less than 10 percent.⁵⁷ DCA may allow the projected five-year capital outlay full-time equivalent student growth rate exceed 10 percent when the projected 10-year capital outlay full-time equivalent student enrollment is less than 2,000 students and the capacity rate for all schools in the district in the tenth year will not exceed the 100 percent limitation.⁵⁸ DCA may allow a single school to exceed the 100 percent limitation if the capacity rate for that single school is not greater than 105 percent.⁵⁹

Further, DCA may exempt a municipality from school concurrency requirements if the municipality:

- ❖ Has issued development orders for fewer than 50 residential dwelling units during the preceding five years or has generated fewer than 25 additional public school students during the preceding five years;
- ❖ Has not annexed new land during the preceding five years in land use categories that permit residential uses that will affect school attendance rates; and
- ❖ Has no public schools located within its boundaries.⁶⁰

⁵⁵ *Id.*

⁵⁶ Section 163.3180(13)(e)4., F.S.

⁵⁷ Section 163.3177(12)(a), F.S.

⁵⁸ *Id.*; see *supra* note 47 (discussion of CS/CS/SB 360 (2009)).

⁵⁹ Section 163.3177(12)(a), F.S.

⁶⁰ Section 163.3177(12)(b), F.S.

What are the penalties for failure to implement school concurrency?

DCA may require a local government or district school board to show cause for failure to enter into an interlocal agreement or otherwise implement school concurrency. If sufficient cause is not found, DCA must submit its findings to the Administration Commission. The Administration Commission may impose specified penalties on local governments.⁶¹ A local government entity may be declared ineligible for state funding for roads, bridges, or water and sewer systems; specified state grants; and beach management funds.⁶² The State Board of Education may impose the following penalties on district school boards – reduction of discretionary lottery funds, withholding of state funds and discretionary grant funds, or ineligibility for competitive grants. Additionally, a school board may be required to periodically report its progress towards compliance to the state board.⁶³

Where can I get additional information?

Florida Department of Education

Office of Educational Facilities
(850) 245-0494
<http://www.fldoe.org/edfacil/>

Department of Community Affairs

Division of Community Planning
School Planning and Coordination
(850) 487-4545
<http://www.dca.state.fl.us/fdcp/dcp/index.cfm>

Florida House of Representatives

Education Committee
(850) 488-7451
<http://www.myfloridahouse.gov>

⁶¹ Section 163.3177(12)(j), F.S.; *see supra* note 47 (discussion of CS/CS/SB 360 (2009)). The administration commission is a body consisting of the Governor and cabinet. Section 163.3164(1), F.S.

⁶² Section 163.3184(11), F.S.; *see supra* note 47 (discussion of CS/CS/SB 360 (2009)).

⁶³ Section 1008.32(4), F.S.; *see supra* note 47 (discussion of CS/CS/SB 360 (2009)).